

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

**Chief Bankruptcy Judge**

**Sacramento, California**

**April 19, 2022 at 2:00 p.m.**

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| 1. <a href="#"><u>21-24203-E-13</u></a><br><a href="#"><u>DPC-1</u></a><br><br>1 thru 2 | <b>MICHAEL/SHANON BENNETT</b><br><b>Richard Kwun</b> | <b>CONTINUED OBJECTION TO<br/>CONFIRMATION OF PLAN BY<br/>TRUSTEE DAVID P. CUSICK</b><br><b>1-26-22 [22]</b> |
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on January 26, 2022. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection.

<b>The Objection to Confirmation of Plan is <span style="color: red;">XXXXX</span>.</b>
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The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that:

- A. Feasibility - Debtor may be unable to make plan payments.

- B. Plan Relies on Pending Motion - Debtor's Plan relies on Motion to Avoid Lien of Capital One Bank.

## **DISCUSSION**

Trustee's objections are well-taken

### **Infeasible Plan**

Trustee alleges that the Plan may not be feasible. 11 U.S.C. § 1325(a)(6). Debtor's Statement of Financial Affairs indicates Debtor does not have a business. However, at the Meeting of Creditors and Schedule I, Debtor indicates he has been self employed. However, the total gross income appears to be speculative. Debtor admitted he did not receive any gross income in January 2022. Without a stable income, it does not appear Debtor can be able to afford plan payments. Thus, the Plan may not be confirmed.

### **Debtor's Reliance on Motion to Value Secured Claim**

A review of Debtor's Plan shows that it relies on the court granting Debtor's Motion to Avoid Lien of Capital One Bank. Given this Motion has been granted, Docket Control No. RK-1, this objection is moot.

At the hearing, the Trustee reported that Debtor is current, but questions the accuracy of Schedule I. While schedule I is a "hopeful" projection, in the first couple of months, it appears Debtor is generating money.

The Trustee agreed to an extended continuance in light of Debtor's counsel's reported steps being taken to address the feasibility issues.

### **April 19, 2022 Hearing**

At the hearing xxxxxxxxxxxxxxxxxxxxxx

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection to Confirmation of Plan is xxxxxx.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Chapter 13 Trustee, and Office of the United States Trustee on February 21, 2022. By the court's calculation, 57 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Objection to Proof of Claim Number 2-1 of Equity Trust Co., is overruled.**

Michael Hugh Bennett and Sharon Bennett, Chapter 13 Debtor, ("Objector") requests that the court disallow the claim of Equity Trust Co., ("Creditor"), Proof of Claim No. 2-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of \$99,990.78. Objector asserts that Creditor's claim suffers from faulty accounting, improper application of contractual interest, no supporting documentation, and improperly claimed attorney fees.

#### **TRUSTEE'S RESPONSE**

Chapter 13 Trustee, David P. Cusick ("Trustee") filed a Response to Debtor's Objection to Claim on April 5, 2022. Dckt. 44. Trustee responds to Objector's Objection as follows:

- A. The Objection lacks particularity and specific facts. Trustee states it appears both the Objector and the Creditor have miscalculated the amounts due. Accordingly, Trustee does not take a position as to whether the Objection should be sustained or overruled and will instead monitor the proceedings and provide additional information that the court may deem helpful.

- B. In the prior dismissed bankruptcy case, Case No. 19-27111, Trustee administered the Plan while the case was pending. Creditor Equity Trust Company Bruce Nelson IRA filed a Proof of Claim in the prior case asserting a secured claim of \$88,644.36 with \$13, 727.52 in pre-petition arrears. Proof of Claim No. 5-1.

Creditor also filed a Notice of Post-Petition Mortgage Fees, Expenses, and Charges on March 11, 2021, in the amount of \$660.94 for an insurance advance. That claim was not provided for in the confirmed Plan. The confirmed Plan called for full payment with interest as a Class 2 creditor. Dckt. 76. The Trustee ultimately disbursed \$17,762.17 in principal and \$15,332.17 in interest to the Creditor.

- C. In the current case, Creditor filed a Proof of Claim on January 26, 2022, in the amount of \$99,990.78, entirely pre-petition arrears. Proof of Claim No. 2-1. The proposed Plan calls for the Creditor to be paid in full with interest as a Class 2 creditor. Dckt. 3. As the claim is listed as “Non-PMSI” no pre-confirmation adequate protection payments have been disbursed to the Creditor.
- D. The Debtor is delinquent in Plan payments in the amount of \$1,950.00.

## **CREDITOR’S RESPONSE**

Equity Trust Company fbo Bruce A. Nelson IRA (“Creditor”) filed a Response to Debtor’s Objection to Claim on April 6, 2022. Dckt. 48. Creditor responds to Objector’s Objection as follows:

1. The Objection was not properly served on the Creditor. The Objection was served by ECF to “Colby R. Halavais c/o Equity Trust.” However Creditor has not registered or consented to ECF service. Accordingly, Creditor’s Response is one day late and Creditor requests that the court nevertheless consider the same.
2. The Objection fails to meet Debtor’s burden of proof to refute the *claim’s prima facie* validity and instead merely asserts that the payments made in the prior Chapter 13 case were not properly applied.
3. Creditor’s claim complies with the requirements of Rule 3001 and is considered valid on its face.
4. The party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of the proof of claim.
5. The calculations in the Objection are incorrect, as follows:
  - A. The principal balance of \$88,646.36 at an interest rate of 10% was reduced by \$17,762.17 and the interest was reduced by \$15,332.17 in the previous case resulting in an outstanding balance of \$70,884.19.
  - B. The claim accrued interest from August 1, 2021 to December 19, 2021 at the contract rate of 16.75%. The final Plan payment in the prior case was received September 23, 2021 and Debtor paid interest through July 31,

2021. Dismissal of the prior case reverted the interest rate back to 16.75% resulting in additional interest of 6.75% from November 15, 2019.

- C. Notary fees, insurance advances, and foreclosure costs are evidenced by the accompanying Declaration of Bruce Nelson.
- D. Attorney's fees were previously shown in the prior case and are thus res judicata.

## **DEBTOR'S REPLY**

Objector filed a Reply to Equity Trust Company's Response on April 11, 2022. Dckt. 51. Objector replies to Creditor's Response as follows:

- A. The Objection was properly served by ECF because Creditor's attorney is a registered e-filer with the bankruptcy court pursuant to Committee Notes to the 2019 amendment to FRBP 9036.

For an objection to claim, the required service has been specified by the United States Supreme Court in Federal Rule of Bankruptcy Procedure 3307(a)(2), which states:

### **(2) Manner of Service**

(A) The objection and notice shall be served on a claimant by first-class mail to the person most recently designated on the claimant's original or amended proof of claim as the person to receive notices, at the address so indicated; . . .

Proof of Claim 2-1 specifies that the person designated on the Proof of Claim to receive notices is:

Halavais & Associates, APC  
1 Orchard Rd. Suite 110  
Lake Forest CA 92630

Proof of Claim 2-1, Part 1, ¶ 4. Proof of Claim 2-1 is signed by Coby Halavais, Esq., who is identified as an attorney with Halavais & Associates, APC. *Id.*, Part 3.

The Certificate of Service for the Objection to Claim states that Coby R. Halavais, the person specified to receive notice on Proof of Claim 2-1, and that such service was electronically done. The statement of service being made is a cryptic "Served by ECF." It does not clearly state that Coby Halavais was served electronically, as the person to receive notice stated on Proof of Claim 2-1, by the Clerk of the Court by electronic service as a registered electronic filer in the Eastern District of California. Such shortcoming in description does not render the service defective.

The court notes that in the Response Objector appears to state that since electronic service is permitted, and Creditor is represented by an attorney in the bankruptcy case, then electronic service on that attorney would be sufficient for all objections and contested matters commenced. As identified above, it is the person who is to receive notice that is the person to be served with the objection. For contested matters, Federal Rule of Bankruptcy Procedure 9014(b) states that service must be made on

the party as would be required for a summons and complaint - Fed. R. Civ. P. 4, Fed. R. Bankr. P. 7004. The party or its agent for service must be served for each contested matter, and not merely an attorney who filed a request for notice or appeared in some other contested matter.

- B. The Creditor is required to show how the Trustee's total disbursement in the previous case was applied. The Creditor omits any calculations.
- C. The claim of attorney fees is improper on the ground of res judicata and failure to provide a lodestar analysis.

## DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial evidence to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

Once a party has objected to a proof of claim, the creditor asserting the claim may not withdraw the claim except on order of the court. FED. R. BANKR. P. 3006.

Federal Rule of Bankruptcy Procedure 3001(c)(2)(A) states:

If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest fees, expenses, or charges shall be filed with the proof of claim.

Here, On January 26, 2022, Creditor filed its Proof of Claim in the amount of \$99,990.78. Proof of Claim No. 2-1. Attached to the Proof of Claim is a "Total Claim & Pre-Petition Arrearage" sheet. Claim No. 2-1.

The sheet reflects an outstanding principal balance of \$70,882.19, \$14,991.10 in accrued interest, \$272.52 in accrued late fees, \$20.00 in notary fees, \$2,705.92 in interest advances, \$4,133.54 in attorneys' fees, and \$6,985.51 in foreclosure fees and costs. Claim No. 2-1. The Proof of Claim attaches the Promissory Note Endorsement, Note Secured by a Deed of Trust, Deed of Trust, and Assignment Deed of Trust. Claim No. 2-1.

The Claim and supporting exhibits at minimum provide the court with sufficient evidence to validate the total amount of Creditor's claim, which is in line with Federal Rule of Bankruptcy Procedure 3001(c)(2)(A). See also, *In re Steffens*, 2005 Bankr. LEXIS 3106 (Bankr. D. Mont. Aug. 26, 2005) (a Proof of Claim include an itemized summary of account showing at a minimum the unpaid

principal, all accrued interest to the date of filing the petition, fees, costs, and any other prepetition charges, per diem interest, the last date of payment, and in the case of transferred claims an identification of the transferors and transferees).

Debtor's objection is skinny. A review of the Objection and docket reflects Debtor failed to provide any exhibits to corroborate their arguments of faulty accounting, lack of documentation, and attorney fees requested without task billing analysis. Debtor does provide a Declaration of Michael Hugh Bennett in support of the Objection. Dckt. 37. The Declaration offers ten (10) lines of evidence and six (6) sentences which does not provide any proof that the arguments provided in the Objection can be substantiated.

Upon the court's review, Creditor's Proof of Claim 2-1 and Response, Dckt. 48, provides adequate information to the court to evidence their Proof of Claim. Page 4 of Creditor's Proof of Claim provides an itemized breakdown the Claim totaling \$99,990.78.

Further, Creditor's Response provides how the principal balance of the claim was calculated. Dckt. 48; P. 3, Line 5-12. Additionally, the Declaration of Bruce A. Nelson in support of Creditor's Response to Debtor's Objection (Dckt. 49) provides great detail of how the accrued interest in the Proof of Claim is calculated, as well as how the notary fees, claimed insurance advances, additional insurance advance, foreclosure fees and costs, and bankruptcy fees and costs came to be. The Declaration also consists of Exhibits substantiating Mr. Nelson's arguments.

The court does note that filing exhibits with a declaration is improper pursuant to Local Rules 9004-2(c)(1). Failure to properly organize pleadings and file them in compliance with the Local Bankruptcy Rules may result in the court not identifying such hidden pleading for consideration. With respect to attorney's fees, Creditor essentially provides a brief Lodestar analysis in the body of his Objection leaving no reason to deny fees. Dckt. 48.

Based on the evidence before the court, Debtor has failed to provide sufficient evidence to rebut Creditor's Proof of Claim 2-1. The Objection to the Proof of Claim is overruled, without prejudice.

~~The court shall issue an order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Objection to Claim of Equity Trust Co., ("Creditor"), filed in this case by Michael Hugh Bennett and Sharon Bennett, Chapter 13 Debtor, ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Objection to Proof of Claim Number 2-1 of Creditor is overruled.~~

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 15, 2022. By the court's calculation, 63 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

<p><b>The Motion to Confirm the Plan is denied, without prejudice.</b></p>
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The debtor, Barbaree Annette Jernigan and Lance Hunter Lighthall ("Debtor") seeks confirmation of the Chapter 13 Plan. The Plan provides:

- A. payment for months 1 through 4 shall be \$600.00, in month 5 shall be \$362,865.26, and in months 6 through 60 shall be \$600.00.
- B. The administrative fees pursuant to section 3.06 shall be paid in months 1 through 10. The dividend to Towd Point Mortgage Trust 2018-6 c/o Select Portfolio Servicing, Inc., (2<sup>nd</sup> DOT for 8330 Mosquito Rd, Placerville, CA 95667) in months 1 through 10 shall be \$56.00 and in months 11 through 13 shall be \$264.02.
- C. Debtor shall sell the real property located at and commonly described as 6470 Ridgeway Dr, Pollock Pines, CA 95726. Said sale shall be subject to prior court approval. From the proceeds of sale, Debtor shall pay the following creditors:



1. U.S. Bank National Association c/c U.S. Bank Home Mortgage, a division of U.S. Bank N.A. (1<sup>st</sup> DOT for 6470 Ridgeway Dr, Pollock Pines, CA 95726).
2. Bank of America, N.A. (1<sup>st</sup> DOT for 6470 Ridgeway Dr, Pollock Pines, CA 95726).
3. El Dorado County Tax for 6470 Ridgeway Dr, Pollock Pines, CA 95726.
4. Closing costs and real estate agent fees.

D. Debtor estimates the amount of said claims to be approximately \$160,538.73 in secured and priority claims, \$26,738.00 in closing costs and real estate agent fees, administrative fees, and \$138,500.00 in general unsecured claims.

Plan, Dckt. 26. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

### **CREDITOR'S OPPOSITION**

Bank of America, N.A. ("Creditor") holding a secured claim filed an Opposition on March 4, 2022. Dckt. 33. Creditor opposes confirmation of the Plan on the basis that:

- A. It fails to provide for ongoing post-petition payments. The Note relating to Creditor's secured claim matures July 31, 2033, which is after the term of the Debtor's Plan, yet the Plan makes no provision for ongoing post-petition payments. The plan provides for the sale of the Property in the future to fund the Plan.

### **CREDITOR'S OPPOSITION**

U.S. Bank National Association ("Creditor U.S. Bank") holding a secured claim filed an Opposition on April 5, 2022. Dckt. 38. Creditor opposes confirmation of the Plan on the basis that:

- A. Debtor is in month 3 of the Plan and has failed to file a Motion to Sell the secured property or provide any information regarding whether a sale is imminent. Debtor has not made monthly payments under the note while the Plan is pending. Creditor U.S. Bank also has concerns that the secured property will sell within the time set forth in the Plan.

### **CHAPTER 13 TRUSTEE'S OPPOSITION**

Chapter 13 Trustee, David P. Cusick ("Trustee") filed an Opposition on April 5, 2022. Dckt. 41. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtors do not appear to be able to comply with the Plan or have the ability to make

Plan payments. Debtors scheduled the Ridgeway property as worth \$362,300.00, Debtors' Plan calls for payments over 60 months paying 100% to unsecured claims estimated at \$160,166.00, with Plan payments of \$600.00 for months 1 through 4, \$362,865.25 in month 5, and \$600.00 for months 6 through 60. The Plan calls for the sale of 6470 Ridgeway Dr., Pollock Pines. Debtor has not yet employed a real estate agent or broker, and the Trustee is not certain when and if the Debtors intend to proceed with the sale of the real property so as to make the payment in month 5.

- B. Lack of adequate protection payments. Debtors' Plan filed February 15, 2022, failed to propose adequate protection payments to the Debtors' second mortgage held by U.S. Bank National Association regarding 6470 Ridgeway Dr., Pollock Pines, CA 95726. The Plan states in part that the Post-Petition Monthly Payment should be under the additional provisions. In addition, under Class 4, section 3.10 of the Plan, Debtor calls for the Post-Petition Payments to Bank of America, National Association, creditor holding the first deed of trust on Debtors' real property located at 6470 Ridgeway Dr., Pollock Pines, CA 95726, to be specified under the additional provisions. While the additional provisions do account for Debtors' intent to sell and pay off these liens, Debtors fail to provide adequate protection payments prior to this sale.

## DISCUSSION

### Failure to Provide for a Secured Claim

Creditor asserts a claim of \$75,546.32 in this case. Debtor's Schedule D estimates the amount of Creditor's claim as \$62,439.76 and indicates that it is secured by a first deed of trust on Debtor's residence. The Plan provides for treatment of this as a Class 4 claim, but (because Debtor asserts that it is subject to a claims valuation pursuant to 11 U.S.C. § 506(a)), does not provide a provision for ongoing post-petition payments.

Creditor alleges that the Plan is not feasible and violates 11 U.S.C. § 1322(b)(5) because it contains no provision for payment of Creditor's matured obligation, which is secured by Debtor's residence. *See* 11 U.S.C. § 1325(a)(6).

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to the Chapter 13 Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may not modify a home loan but may modify other secured claims (11 U.S.C. § 1322(b)(2)), cure any default on a secured claim—including a home loan—(11 U.S.C. § 1322(b)(3)), and maintain ongoing contract installment payments while curing a pre-petition default (11 U.S.C. § 1322(b)(5)).

If a debtor elects to provide for a secured claim, 11 U.S.C. § 1325(a)(5) gives the debtor three

options:

- A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),
- B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or
- C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

Those three possibilities are relevant only if the plan provides for the secured claim, though.

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek termination of the automatic stay so that it may repossess or foreclose upon its collateral. The absence of a plan provision is good evidence that the collateral for the claim is not necessary for the debtor's rehabilitation and that the claim will not be paid. This is cause for relief from the automatic stay. *See* 11 U.S.C. § 362(d)(1).

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this Plan does not provide for respondent Creditor's secured claim raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). That is reason to deny confirmation.

#### **Failure to Cure Arrearage of Creditor**

The objecting creditor, U.S. Bank, holds a deed of trust secured by Debtor's residence. Creditor U.S. Bank has filed a timely proof of claim in which it asserts \$10,163.62 in pre-petition arrearages. The Plan proposes to cure those arrearages by selling Debtor's residence. However, Debtor has failed to file a Motion to Sell and has not provided any information regarding whether a sale is imminent. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

#### **Failure to Afford Plan Payment / Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's Plan indicates that Debtor will sell the property located at 6470 Ridgeway Drive, Pollock Pines, California in Month 5; however, Debtor has failed to employ a real estate agent and the Trustee is not certain if the sale will proceed. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

#### **Default in Adequate Protection Payments**

Debtor has not remitted monthly adequate protection payments to Creditor U.S. Bank. Debtor's Plan fails to provide for such payments. Debtor's delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Chapter 13 Plan filed by the debtor, Barbaree Annette Jernigan and Lance Hunter Lighthall (“Debtor”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Confirm the Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 1, 2022. By the court's calculation, 49 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is denied.**

The debtor, Shari Ann Lambert ("Debtor") seeks confirmation of the Modified Plan because Debtor's income and expenses have changed. Their adoption assistance decreased from \$1,157.00 to \$967.00; their tax refunds have decreased by approximately 50% with an expected return of \$4,100.00 for the 2021 tax year; their income from employment has increased; their gas expense has decreased; and they no longer have daycare expenses. Declaration, Dckt. 80.

The Modified Plan provides \$1,840.00 to be paid for months 50-51, then \$2,765.00 for months 52-60, tax refund (estimated at \$4,100.00) to be submitted no later than month 53, Guild Mortgage Company (pre-petition arrears) will receive a monthly dividend of \$0.00 for months 50-60 (claim is paid in full), Guild Mortgage Company (post-petition arrears) will receive a lump sum payment of \$2,560.61 no later than month 53 to pay in full, Safe Credit Union (for late fees) will receive a monthly dividend of \$0.00 for months 50-60 (claim paid in full), and a 48.63% percent dividend to unsecured claims totaling \$64,536.91. Modified Plan, Dckt. 78. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 5, 2022. Dckt. 87. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent \$790.00 in Plan payments.
- B. Post-Petition arrears are incorrect with respect to the Class 1 claim.

## DISCUSSION

### Delinquency

The Chapter 13 Trustee asserts that Debtor is \$790.00 delinquent in plan payments, which represents less than one month of the \$2,109.69 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### Post-Petition Arrears

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Due to Debtor's failure to make timely Plan payments, the Trustee was unable to pay the post-petition contract installments to Guild Mortgage Company for the months of December 2020, January 2022, and March 2022. The information provided in the Plan does not match the Trustee's records. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Shari Ann Lambert ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 9, 2022. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

<p><b>The Motion to Confirm the Modified Plan is denied, without prejudice.</b></p>
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The debtor, Loraine A. Dixon ("Debtor") seeks confirmation of the Modified Plan because she had a windfall and change of employment status. Declaration, Dckt. 97. The Modified Plan provides for Plan payments in the amount of \$3,000.00 per month commencing April 25, 2022 for 48 months, Trustee is to disburse funds as follows: a lump sum payment to Class 2 claim CA Department of Justice, thereafter Class 2 Claim to receive \$1,500.00 per month until paid in full, and a 100% percent dividend to unsecured claims totaling \$64,420.96. Modified Plan, Dckt. 96. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 5, 2022. Dckt. 100. Trustee opposes confirmation of the Plan on the basis that:

- A. The plan may not be feasible as Debtor has not filed Supplemental Schedules I and J evidencing current income and expenses.

- B. Plan terms in non-standard provisions are unclear. The NSP state, in the second paragraph, that the “Plan Payments of \$3,000.00 per month will commence April 25, 2022 for 48 months.” Later down the page in the eight paragraph, labeled “3.,” it states, “the plan is amended to increase Debtor’s payment by \$230.00 from \$1,130.00 to \$1,370.00 per month.” The Trustee is uncertain about what the exact plan payment should be.
- C. Plan terms in non-standard provisions are unclear. The NSP state, “the Class 2 Claim to receive \$1,500.00 per month until paid in full.” Further down it states, “the distribution amount to the DOJ from 982 to \$1,190.00 per month.” The Trustee is uncertain about what the exact monthly dividend to the Class 2 Creditor, Department of Justice, should be.

## **DEBTOR’S REPLY**

On April 12, 2022, Debtor filed a Reply to Trustee’s Opposition. Dckt. 103. The Reply addresses the Trustee’s concerns, as to the following:

- A. Debtor has recently become employed which supports the plan payment of \$3,000.00 per month until the completion of the plan.
- B. Debtor’s plan intends to provide for the payment of \$64,599.00 through March of 2022, a lump-sum payment of \$50,000.00, and \$1,500.00 per month for 48 months.
- C. Debtor’s intention is to increase the plan payments to \$3,000.00 per month for the remaining 48 months, which is intended to over-ride #3, which was part of the original plan confirmation.
- D. The Plan is intended to direct the “lump-sum” payment to CA Dept. Of Justice arising from the \$49,367.53 the Trustee has on-hand, and as a Class 2 Claim at \$1,500.000 per month for the remainder of the claims, and balance being issued to the unsecured claims in the normal manner of disbursement.

## **DISCUSSION**

### **Failure to Afford Plan Payment / Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6).

- A. Debtor has not filed Supplemental Schedules I and J evidencing current income and expenses.
- B. The NSP state, in the second paragraph, that the “Plan Payments of \$3,000.00 per month will commence April 25, 2022 for 48 months.”



Later down the page in the eight paragraph, labeled “3.,” it states, “the plan is amended to increase Debtor’s payment by \$230.00 from \$1,130.00 to \$1,370.00 per month.”

- C. The NSP state, “the Class 2 Claim to receive \$1,500.00 per month until paid in full.” Further down it states, “the distribution amount to the DOJ from 982 to \$1,190.00 per month.”

Without an accurate picture of Debtor’s financial reality, the court cannot determine whether the Plan is confirmable.

The Modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Loraine Ann Dixon (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

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The Proof of Service states that the Motion and supporting pleadings were served on Debtor, the Chapter 13 Trustee, creditors, and Office of the United States Trustee on March 29, 2022. By the court's calculation, 21 days' notice was provided.

Federal Rule of Bankruptcy Procedure 1017(a) provides that a case shall not be dismissed on motion of the petitioner, for want of prosecution or other cause, or by consent of the parties, before a hearing on the notice as provided in Federal Rule of Bankruptcy Procedure 2002. Debtor provided 21 days' notice pursuant to Federal Rule of Bankruptcy Procedure 2002; therefore, the notice requirement is satisfied.

**The Motion to Dismiss is granted and the bankruptcy case is dismissed**

Debtor, William Thompson and Lottie Mae Thompson ("Debtor"), seeks dismissal of the case on the basis that Debtor has paid his arrears through the plan and intends to sell his home. Motion, Dckt. 46 at ¶ 4. Therefore, Debtor no longer needs the bankruptcy protection. *Id.*

## DISCUSSION

11 U.S.C. § 1307(b) provides:

On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

In keeping with the Congressional intent that a Chapter 13 case is completely voluntary, 1307(b) gives an absolute right for a petitioner to dismiss a Chapter 13 petition. 8 Collier on Bankruptcy P 1307.03 (16th 2021); *In re Nash*, 765 F.2d 1410, 1413 (9th Cir. 1985).

Debtor further notes that the joint debtor has passed away (see Notice of Death, Dckt. 44) and no estate has been or is being administered on her behalf. Dckt. 46 at ¶ 5. Thus, Debtor requests this case be dismissed in its entirety, including as to the deceased joint debtor. *Id.*

At the hearing **XXXXXXX**.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Debtor, Tricia Tami Rojas (“Debtor”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted and this Bankruptcy Case is dismissed.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

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Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on March 22, 2022. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing -----  
-----.

<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
---

The Chapter 13 Trustee, David Cusick ("Trustee") opposes confirmation of the Plan on the basis that:

- A. The Debtor admitted at the continued First Meeting of Creditors held on March 17, 2022, that he is uncertain if 2019 tax returns have been filed. The Internal Revenue Service has filed a Proof of Claim reflecting no tax returns were filed for 2019, as it estimated \$3,524.55 is owed as an unsecured priority.
- B. Debtor's Plan calls for a Motion to Value Collateral being filed for Regional Acpt Corp, listed in Class 2B, but also states the treatment for the value of Creditor's interest and the monthly dividend as, "see add'l provisions." The Additional Provisions states, "The Class 2 claim of Reginal Acpt Corp is disputed and not subject to payment as the Debtor

received a 1099-C, cancellation of debt in December 2021.” Debtor has filed a Motion to Value Collateral, which is set for hearing on April 5, 2022. As the Trustee understands the plan, the claim is not to be paid whether or not the motion to value is granted. The Trustee believes Debtor can afford the payments and comply with the Plan.

- C. Debtor’s first Plan payment of \$100.00 will be due on March 25, 2022, which is on or before the hearing on this Objection.

## **DISCUSSION**

Trustee’s objections are well-taken.

### **Failure to File Tax Returns**

Debtor admitted at the Meeting of Creditors that the federal income tax return for the 2019 tax year has not been filed still. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

### **Debtor’s Reliance on Motion to Value Secured Claim**

A review of Debtor’s Plan shows that it relies on the court valuing the secured claim of Regional Acpt Corp. Debtor has filed a Motion to Value the Secured Claim of Regional Acpt Corp, which was heard on April 5, 2022. However, the claim is not to be paid whether or not the Motion to Value is granted. Therefore the Trustee believes Debtor can afford the payments and comply with the Plan pursuant to, 11 U.S.C. § 1325(a)(6).

### **Plan Payment Coming Due**

Trustee notes that Debtor’s first Plan payment of \$100.00 is due on March 25, 2022, prior to the hearing on the Objection

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick (“Trustee”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

-----

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on March 18, 2022. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Hardship Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

<p><b>The Motion for Entry of Hardship Discharge is denied.</b></p>
---

Tiazjanae Imani Wilridge ("Debtor") moves for entry of a hardship discharge on the grounds that she lost her job after her car was totaled and therefore cannot afford to continue making her plan payments. Debtor argues that the unsecured creditors have received at least what they would have received if Debtor had filed a Chapter 7 bankruptcy based on what Debtor has already paid into the plan. Debtor additionally argues that modification of her plan is not feasible because her monthly expenses now surpass her monthly income.

#### TRUSTEE'S OPPOSITION

The Chapter 13 Trustee David P. Cusick ("Trustee") filed an opposition to Debtor's Motion for Hardship Discharge on April 4, 2022. Dckt. 87. Trustee opposes on the following grounds:

- A. The Trustee does not show an amended budget was filed. A current (supplemental Schedule I & J, is probably needed so the Court can determine if modification of the plan is practicable.
- B. Plan modification may be practicable.

#### APPLICABLE LAW

Section 1328(b) of the Bankruptcy Code states:

Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if–

- (1) the debtor’s failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
- (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
- (3) modification of the plan under section 1329 of this title is not practicable.

The provisions of 11 U.S.C. § 1328(b) are written conjunctively and must all be satisfied to grant a hardship discharge. *See, e.g., In re Cummins*, 266 B.R. 852, 855 (Bankr. N.D. Iowa 2001). Debtor has the burden of proving each of those elements. *Spencer v. Labarge (In re Spencer)*, 301 B.R. 730, 733 (B.A.P. 8th Cir. 2003). “Unsubstantiated and conclusory statements” about a debtor’s inability to afford plan payments anymore are insufficient when considering a motion for a hardship discharge. *See, e.g., In re Dark*, 87 B.R. 497, 498 (Bankr. N.D. Ohio 1988).

Some courts have looked for a catastrophic event to justify a hardship discharge, but others have relied upon the plain meaning of 11 U.S.C. § 1328(b) to determine whether a “debtor is justly accountable for the plan’s failure.” *In re Bandilli*, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999). Determining whether a debtor is justly accountable is fact-driven, and some considerations include:

- A. Whether the debtor has presented substantial evidence that he or she had the ability and intention to perform under the plan at the time of confirmation;
- B. Whether the debtor did materially perform under the plan from the date of confirmation until the date of the intervening event or events;
- C. Whether the intervening event or events were reasonably foreseeable at the time of confirmation of the Chapter 13 plan;
- D. Whether the intervening event or events are expected to continue in the reasonably foreseeable future;
- E. Whether the debtor had control, direct or indirect, of the intervening event or events; and
- F. Whether the intervening event or events constituted a sufficient and

proximate cause for the failure to make the required payments.

*Id.*

At least one court has found that an economic hardship (i.e., lost business revenue and increased expenses) is not the kind of event “such as death or disability which prevent[s] a debtor, through no fault of his or her own, from completing payments.” *In re Nelson*, 135 B.R. 304, 306 (Bankr. N.D. Ill. 1991).

Sub-section 11 U.S.C. § 1328(b)(1) “requires that the circumstances leading to the debtor’s failure to make payments be beyond the debtor’s control.” *In re Cummins*, 266 B.R. at 855. Such aggravating circumstances need to be “truly the worst of the awfals—something more than just the temporary loss of a job or a temporary physical disability.” *In re Nelson*, 135 B.R. at 307 (citation omitted).

The second portion of 11 U.S.C. § 1328(b) requires that unsecured claims receive no less than they would have through Chapter 7 liquidation. That is called the “best interests” test that is identical to Chapter 13 plan confirmation in 11 U.S.C. § 1325(a)(4). *In re Cummins*, 266 B.R. at 856 (citations omitted). If an unsecured claim would not receive a distribution through Chapter 7, then any payment from a Chapter 13 plan satisfies that requirement. *Id.* (citing *In re Nelson*, 135 B.R. at 308).

Finally, 11 U.S.C. § 1328(b)(3) requires that modifying the Chapter 13 plan not be practicable. Proposing a modified plan “is not ‘practicable’ if there is no source of income to fund the modified plan.” *Id.* (citing *In re Bond*, 36 B.R. 49, 51 (Bankr. E.D.N.C. 1984)).

The Ninth Circuit has instructed that “[n]othing in the Code compels a bankruptcy court to close, rather than dismiss, a Chapter 13 case when a debtor fails to complete [a] plan.” *HSBC Bank USA, N.A. v. Blendheim (In re Blendheim)*, 803 F.3d 477, 496 (9th Cir. 2015). Furthermore, “the availability of case closure does not eliminate a bankruptcy court’s duty to ensure that a debtor complies with the Bankruptcy Code’s ‘best interests of creditors’ test, 11 U.S.C. § 1325(a)(4), and the good faith requirement for confirming a Chapter 13 plan.” *Id.* The Ninth Circuit found explicitly that a “bankruptcy court [had] properly conditioned permanent lien-voidance upon the successful completion of the Chapter 13 plan payments. If the debtor fails to complete the plan as promised, the bankruptcy court should either dismiss the case or, to the extent permitted under the Code, allow the debtor convert to another chapter.” *Id.*

## **DISCUSSION**

### **Missing Amended Budget**

Debtor states she filed an amended budget showing her inability to afford the remaining plan payments to Trustee. Dckt. 83 at 2:4-5. However, Trustee notes that no amended budget was filed. Dckt. 87 at 1:25. The court also does not see an amended budget in the docket. Trustee states that a supplemental Schedule I & J may be needed to determine whether modification of the plan is possible. *Id.*

### **Plan Modification May be Practicable**



Trustee cites *In re Sunahara*, 362 B.R. 768, 783 (9<sup>th</sup> Cir. BAP 2005) to explain that the Bankruptcy Code permits debtors to modify a chapter 13 plan “so as to conclude it in fewer than 36 months, without payment of all claims in full.” *Id.* at 2:8-10. While this may be the case, the court still requires Debtor to first file an amended budget to determine whether modification is even a possible. Debtor’s Declaration states that her current sources of income are unemployment and cash aid. Dckt. 85 at ¶ 4. Debtor further states that their monthly income decreased to \$2,345.00 and that their monthly expenses increased to \$2,658.00. *Id.* Based on this, it is unclear whether modification is even feasible. Nevertheless, Debtor’s current supplemental Schedule I & J is needed to make such a determination.

At the hearing, **xxxxxxx**

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Hardship Discharge filed by Tiazjanae Imani Wilridge (“Debtor”) having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is ~~denied~~.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

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Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on February 14, 2022. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

<p><b>The hearing on the Motion to Dismiss is <span style="color: red;">XXXXXXXXXX</span>.</b></p>
--

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. Both debtors, Jolie Ann Barkalow and Michael A. Barkalow ("Debtors") are deceased. Debtors Attorney filed a Notice of Death (Dckt. 23) and Certificates of Death (Dckt. 24).
2. Debtors are delinquent in plan payments.

#### **Attorney's Notice of Death**

Debtors' Attorney filed a Notice of Death of Debtor for each Debtor. Debtors' Attorney indicates:

no one from the family has responded to counsel's efforts to communicate with the decedents' family in order to determine whether or not they intend to pursue a

motion for substitution as the successor or representative to the deceased.

Dckts. 23, 30.

### **Review of File for This Bankruptcy Case**

The proposed Amended Chapter 13 Plan (Dckt. 20) in this case provided for a Class 1 cure of the claim secured by Debtor's Residence. Plan ¶ 3.07; Dckt. 20. Several other secured claims were provided for, priority taxes, and for general unsecured claims a 0.00% dividend.

On Schedule J, Debtor lists having three minor children. Dckt. 1 at 35.

On Schedule A/B Debtor lists the residence property as having a value of \$576,900. *Id.* at 12. Reference is also made to a term life policy. *Id.* at 16. Those appear to be the significant assets of value.

On Schedule D Debtor lists there being two secured claims secured by the Residence, which are stated to total (\$300,000). *Id.* at 22. That is consistent with the secured claims filed by the two creditors. POC 3-1 and POC 8-1.

The two death certificates filed indicate an extraordinarily sad and traumatic cause of the almost simultaneous death of the two debtors and the three minor children losing their parents. An internet search (which is not reference as "evidence") discloses that the extended family is acting to address the needs of the minor children.

From what has been presented, it is not clear whether probate or other proceedings concerning the late debtors or for the care of the children (and their interests in the assets of their late parents) have been commenced. It does appear that a Dana Percival, a family member is organizing fund raising events.

On its face, it there would appear to be around \$205,000 equity in the Residence after payment of the secured claims. This is an asset that could go to the late Debtor's children. Zillow.com (against not referenced as evidence) gives a value of \$604,400 for the Residence, and states that there is an auction of the property pending. It states that the auction is set for April 19, 2022.

In reviewing the file, the court has not granted relief from the stay for such an auction to be conducted. A real property foreclosure search indicates that the Notice of Foreclosure was recorded on September 22, 2021, which was nine days before the September 30, 2022 filing of the Bankruptcy Case.

In light of the substantial assets in this case, before it will be dismissed the court will need a personal representative of the successor to Debtor or one appointed for the late debtors' children to properly adjudicate this Motion.

Through the internet the Trustee and US Trustee can identify family members. They can do a search of the County court files to identify if there are probate, conservatorship, or other proceedings. They can contact Child Protective Services and other County agencies which exist to protect the welfare of minors to see if someone from that office would be appointed to protect a several hundred thousand dollar assets for the late debtors' children. It may be that the sale of the Residence would be conducted

in this bankruptcy case, after which the case could be dismissed.

## **DISCUSSION**

### **Delinquent**

Debtor is \$9,300.00 delinquent in plan payments, which represents multiple months of the \$3,100.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

### **Death of Debtors**

Under 11 U.S.C. § 1016, a Chapter 13 case may be dismissed upon death or incompetency of a debtor. This is largely due to Chapter 13 plans being dependent on the debtor's future earnings. 9 Collier on Bankruptcy P 1016.04 (16th 2021). However, if further administration is possible and in the best interest of the parties, the case may proceed and concluded in the same manner, so far as possible, as though death or incompetency had not occurred, with the court appointing a personal representative successor to the late debtor. 11 U.S.C. § 1016.

However, this is a bankruptcy estate with substantial assets and no identifiable person to whom they will be abandoned upon dismissal. The court continues the hearing pending the appointment of a successor representative for the late debtors and has a representative for the three minor children so that their rights and interests are properly addressed.

### **April 13, 2022 Response**

On April 13, 2022, the late-Debtor's Attorney filed a status report stating Sean Percival, brother of Jolie Barkalow, intends to retain Attorney's firm to have him appointed as the successor in interest to the late Debtors. Additionally, Attorney indicates that it will be likely six months before Mr. Percival has authority from the probate court to transfer interest in any real property. If Mr. Percival is appointed as the successor, he will file a modified plan paying all creditors through the sale of the late Debtor's residence.

Attorney requests this hearing be continued sixty (60) days.

### **April 19, 2021 Hearing**

At the hearing, **xxxxxxxxxx**

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by The Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause

appearing,

**IT IS ORDERED** that the Motion to Dismiss is **xxxxxx**.

10. [22-20239-E-13](#)      **BETHANY JOHNSON**      **OBJECTION TO CONFIRMATION OF**  
[DPC-1](#)      **Peter Macaluso**      **PLAN BY DAVID P. CUSICK**  
3-30-22 [47]

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

**Below is the court’s tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**  
-----

Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney on March 30, 2022. By the court’s calculation, 20 days’ notice was provided. 14 days’ notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing -----  
-----.

<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
---

The Chapter 13 Trustee, David Cusick (“Trustee”) opposes confirmation of the Plan on the basis that:

- A.      Bethany Elaine Johnson (“Debtor”) failed to provide employer payment advices.
- B.      Debtor’s proposed Plan is contingent on pending Motion to Value Collateral.

- C. It is unclear whether Debtor's proposed Plan includes any nonstandard provisions.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Failure to Provide Pay Advices**

Debtor has not provided Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). Debtor has failed to provide all necessary pay stubs. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

### **Debtor's Reliance on Motion to Value Secured Claim**

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Exeter Finance, LLC ("Creditor"). Debtor filed a Motion to Value Collateral of Exeter Finance, LLC on February 28, 2022. Dckt. 27. The Motion is set to be heard on April 12, 2022. Order, Dckt. 34. Creditor filed an objection to Debtor's Motion on March 14, 2022. Dckt. 37. Trustee states that Debtor's proposed Plan is not feasible if Debtor's Motion to Value Collateral is not granted. Dckt. 47 at 2. Fortunately for Debtor, the Motion to Value the secured claim was granted at the April 12, 2022 hearing. Therefore, Trustee's concern regarding this issue is resolved.

### **Failure to Provide Nonstandard Provisions**

Trustee states that § 1.02 of Debtor's proposed Plan was checked to indicate that Nonstandard Provisions exist. Plan, Dckt. 19 at 1. § 7 of the Plan states that "[a]ll nonstandard plan provisions shall be on a separate piece of paper appended to this plan." *Id.* at 6. Debtor's proposed Plan does not include any attached pieces of paper indicating nonstandard provisions. Thus, it is unclear to Trustee whether Debtor intended to include nonstandard provisions or checking the § 1.02 was in error. Dckt. 47 at 2.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick ("Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 28, 2022. By the court's calculation, 50 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

<p><b>The Motion to Confirm the Plan is denied, without prejudice.</b></p>
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The debtor, Marlon San Antonio Valenzuela and Michelle Gumobao Valenzuela ("Debtor") seeks confirmation of the Chapter 13 Plan. The Plan provides the Plan shall be considered current with \$41,462.52 paid in as of February 2022, and Plan payments shall thereafter be \$3,180.00 per month until plan completion. Attorney's fees shall be paid in full prior to distribution to Class 1 arrears claims, and general unsecured non-priority claims. Plan, Dckt. 96. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 4, 2022. Dckt. 101. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor continues to fail to provide the Trustee with 60 days of employer payment advices received prior to the filing of the petition.

## **DISCUSSION**

### **Failure to Provide Pay Advices**

Debtor has not provided the Chapter 13 Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). Debtor has failed to provide all necessary pay stubs. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Chapter 13 Plan filed by the debtor, Marlon San Antonio Valenzuela and Michelle Gumobao Valenzuela (“Debtor”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Confirm the Plan is denied, and the proposed Chapter 13 Plan is not confirmed.



**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 28, 2022. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

The Motion to Withdraw Claim Number 5 has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

<p><b>The Motion to Withdraw Claim Number 5 is denied.</b></p>
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American Express National Bank ("Creditor") is seeking to withdraw their Proof of Claim filed on June 11, 2021, pursuant to Federal Rule of Bankruptcy Procedure 3006. Proof of Claim 5-1.

On February 8, 2022, Michael Roland Stanford and Carol Ann Stanford ("Debtor") filed an Objection to Creditor's Claim. Dckt. 78.

On March 15, 2022, the court held a hearing on Debtor's Objection to Creditor's Claim and ruled in favor Debtor, sustaining the objection and disallowing the claim in its entirety. Dckt. 94.

On March 17, 2022, the court issued an Order stating the Objection to Proof of Claim 5-1 is sustained and the if Creditor, and the claim is disallowed in its entirety.

### **Motion Filed by Creditor**

In the Motion, Creditor states with particularity (as required by Fed. R. Bank. P. 9013) the

grounds and relief requested as follows:

American Express National Bank hereby moves to withdraw its Proof of Claim 5 filed on June 11, 2021 for account number ending 4007 in the amount of \$41,946.34.

This Motion is made pursuant to FRBP Rule 3006.

Motion, Dckt. 85. The above Motion does not state any grounds with particularity, but appears to instead merely be an instruction to the court to enter Creditor's order – no grounds needed to be provided by Creditor (as opposed to every other party in interest in any bankruptcy case).

The "Motion" to withdraw stating the instructions to the court, was filed on February 28, 2022, which was twenty days after the Objection to Proof of Claim 5-1. It appears that Creditor chose to file the "Motion" to withdraw instructing the court to order Creditor's claim withdrawn rather than filing any response to the Objection to Claim.

### **APPLICABLE LAW**

Federal Rule of Bankruptcy Procedure 3006 provides a creditor may withdraw a claim of right unless:

- A. An objection or adversary has been filed after the proof of claim or
- B. Creditor has accepted or rejected the plan or otherwise has participated significantly in the case.

In these instances, the creditor may not withdraw the claim except on order of the court after notice and hearing. An authorized withdrawal of a claim by the court shall constitute withdrawal of any related acceptance or rejection of a plan.

### **DISCUSSION**

Here, the court issued an Order on March 18, 2022, that Creditor's claim was disallowed in its entirety based on Debtor's Objection. That order is a final adjudication of the claim and the debt which Creditor asserted was owed by Debtor.

Creditor offers no explanation as to why Proof of Claim 5-1, which is the subject of a final "judgement" (orders constituting judgments in contested matters and claim objections), would be ripped from the court. Does Creditor believe that is can, by such withdrawal, eviscerate the final order of the court and be free of the effects thereof?

The Ruling on the Objection to Claim includes a determination that the statute of limitations for the debt had long passed, it occurring seven years and one month before the commencement of this case.

Creditor having requested that this court review Proof of Claim 5-1 by prosecuting this Motion to Withdraw Claim, the court sees that on the face of Proof of Claim 5-1 Creditor knew that the

Statute of Limitations had long passed on this debt. On the Information Sheet attached to Proof of Claim 5-1, p. 6, Creditor clearly states that the debt was charged off February 2009. Creditor goes further, stating that the last payment date was July 2010.

With this Bankruptcy Case being filed on May 11, 2021, ten years and ten months after the last payment on the defaulted debt.

California amended the Statute of Limitations law, changing it from a “mere” affirmative defense to a statutory prohibition for a creditor to commence an action or proceeding to enforce the time barred debt. In addition to setting the four year statute of limitations for a contractual obligation, California law further provides:

(d) When the period in which an action must be commenced under this section has run, a person shall not bring suit or initiate an arbitration or other legal proceeding to collect the debt. The period in which an action may be commenced under this section shall only be extended pursuant to Section 360.

Cal Code Civ Proc § 337(d). Filing Proof of Claim 5-1, a legal proceeding to collect a debt, is clearly barred by the claim language of California Code of Civil Procedure § 337(d), which went into effect January 1, 2019 - two years and four months before Debtor commenced this bankruptcy case.

As with judgments, the court included in the Order sustaining the Objection to Claim the standard language stating that requests for attorney’s fees and costs, if any, would be sought as provided in Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054 and 9014.

The court does not see a motion for allowance of prevailing party attorney’s fees for the Objection to Claim. The time period for filing such a motion for attorney’s fees is within fourteen days after the entry of the judgment or order. Fed. R. Civ. P. 54(d)(2)(B), Fed. R. Bankr. P. 7054(b)(2).

### **Creditor Acknowledgment That Motion is Moot**

On April 15, 2022, the Friday before the hearing on Creditor’s Motion, and a month after the court entered the Order Sustaining the Objection to Proof of Claim 5-1, Creditor filed a pleading stating:

American Express National Bank hereby acknowledges its Motion to Withdraw its Proof of Claim 5 filed on February 28, 2022 is moot pursuant to the Court’s March 17, 2021 Order (Doc. 96).

Seeing the Motion to Withdraw and it being prosecuted until the April 15, 2022 filed “It’s Moot” pleading by Creditor, the court pauses and wonders how many other grossly stale proofs of claims Creditor is filing. Clearly, the filing of Proof of Claim 5-1 breached the certifications made pursuant to Federal Rule of Bankruptcy Procedure 9011. Filing Proof of Claim 5-1 violated California law.

At the hearing, **XXXXXXX**

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Withdraw Claim Number 5 filed in this case by American Express National Bank (“Creditor”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Withdraw Claim Number 5 is denied.

13. [18-23848-E-13](#) **RHONDA DEJESUS** **MOTION TO MODIFY PLAN**  
[MAC-5](#) **Marc Carpenter** **3-7-22 [118]**

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 7, 2022. By the court’s calculation, 43 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

<b>The Motion to Confirm the Modified Plan is denied.</b>
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11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Rhonda DeJesus (“Debtor”), seeks confirmation of the Modified Plan due to financial hardship experienced as a direct result of COVID-19. Declaration, Dckt. 120. The Modified Plan provides \$2,206.18 to be paid through 66 payments of 66 months, and a zero percent dividend to unsecured claims totaling \$22,760.39 Third Modified Plan, Dckt. 122. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## **CHAPTER 13 TRUSTEE’S OPPOSITION**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 7, 2022. Dckt. 127. Trustee states they overlooked this matter, which is why their opposition was filed late. The court will consider the opposition given the grounds stated. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent \$10,825.12 in plan payments.
- B. COVID Cares Act has expired.

## **DISCUSSION**

### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$10,825.12 delinquent in plan payments, which represents multiple months of the \$2,206.18 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **CARES Act Expiration**

Trustee objects on the grounds that the CARES Act under 11 U.S.C. § 1329(d) has expired.

Pursuant to the CARES Act, under 11 U.S.C. § 1329(d), modification of a plan that was confirmed before March 27, 2021 may be extended up to seven (7) years so long as the debtor is or has “experienced a material financial hardship” due to COVID-19. 11 U.S.C. § 1329(d), however, has a sunset provision that effectively reverted 11 U.S.C. § 1329(d) to pre-CARES Act provisions on March 27, 2022. *See* H.R.1651 - 117th Congress (2021-2022): COVID-19 Bankruptcy Relief Extension Act of 2021, H.R.1651, 117th Cong. (2021).

A sunset law or sunset provision is defined as a “statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed.” *Black’s Law Dictionary* 1574 (9<sup>th</sup> ed. 2009). The Ninth Circuit has interpreted sunset provisions to render statutes ineffective after the explicit date provided by the sunset provision. *See Bates v. Sullivan*, 894 F.2d 1059, 1071 (9<sup>th</sup> Cir. 1990) (explaining that the statute at issue includes a sunset clause which renders the statute ineffective for cases where determinations are made after the date provided by the clause).

Congress may allow such statutes to expire on the express date given by the sunset provision, opt to extend the expiration date (as in the case of Congress extending the CARES Act amendments to 11 U.S.C. § 1329 for an additional year), or amend/reenact such statutes without the sunset provision.

*See e.g., Richlin Sec. Serv. Co. V. Chertoff*, 553 U.S. 571, 583 n.7 (2008) (describing how the first enacted version of an act had a sunset provision rendering it ineffective after four years, and that Congress reenacted the act without the sunset provision a year later); *Fireman's Fund Ins. Co v. City of Lodi*, 302 F.3d 928, 934 n.2 (9<sup>th</sup> Cir. 2002) (describing how an act "became inoperative" on January 1, 1999 pursuant to a sunset clause and was later reenacted on May 26, 1999 without a sunset clause). Congress has not extended the CARES Act beyond March 27, 2022. Therefore, due to the sunset provision, 11 U.S.C. § 1329(d) is no longer effective and the maximum length of a modified plan is five (5) years, pursuant to 11 U.S.C. § 1329(c).

The plan is therefore overextended and does not comply with the provisions of 11 U.S.C. § 1329(c) and cannot be confirmed.

The Modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Rhonda DeJesus ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

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Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and creditor's Attorney on March 30, 2022. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing -----  
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<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
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The Chapter 13 Trustee, David Cusick ("Trustee") oppose confirmation of the Plan on the basis that:

- A. Debtor's Attorney failed to appear at the First Meeting of Creditors.
- B. Debtor's ongoing mortgage and mortgage arrears may be higher than what Debtor provided for in their proposed Plan.

## DISCUSSION

Trustee's objections are well-taken.

## **Failure to Appear at 341 Meeting**

While Debtor appeared, Debtor's Attorney did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Debtor was not examined at the First Meeting of Creditors, and therefore the meeting has been continued to April 14, 2022. Dckt. 43 at 1. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

## **Failure to Cure Arrearage of Creditor**

Trustee states the Plan states to cure Class 1 creditors, New Rez LLC. However, upon review of the plan, it seeks to cure "Wells Fargo Hm Mortgage." U.S. Bank National Association, c/o Wells Fargo Bank, N.A. ("Creditor"), holds a deed of trust secured by Debtor's residence. The Plan, therefore, has a typographical error when stating Wells Fargo Hm Mortgage has a claim.

Debtor's Plan states the arrears to Class 1 Creditor is in the amount of \$53,571.70, with an arrearage dividend of \$923.65 and a post-petition monthly payment of \$1,638.00. Dckt. 3 at 3. Creditor has filed a timely proof of claim in which it asserts \$61,585.29 in pre-petition arrearages. *See* Claim 2-1. This would be approximately a \$1,027 arrearage dividend. The Plan falls short of curing all of the arrearage. Additionally, Creditor's Proof of Claim states the monthly mortgage, broken down by monthly payment on principal and monthly escrow, is \$2,050.17. Therefore, there is approximately a \$500 discrepancy between the Plan and the Proof of Claim. Pursuant to section 3.02 of the Plan, a Creditor's Proof of Claim shall determine the amount and classification of a claim unless there is a court order specifying otherwise. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick ("Trustee") and U.S. Bank National Association ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.



**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

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Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on March 1, 2022. By the court's calculation, 49 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing -----

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<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
---

U.S. Bank National Association ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

- A. The Debtor's Plan does provide for ongoing mortgage payments to Creditor's servicing agent, Wells Fargo Bank, N.A. in Class 1, but lists the servicer as Wells Fargo Hm Mortgage rather than Wells Fargo Bank, N.A. The ongoing mortgage payment is only listed at \$1,638.00 rather than the estimated \$2,152.41.
- B. The Plan fails to provide for payment in full of the Secured Claim through the Plan as only pre-petition arrears of \$53,571.70 are provided for in the Plan rather than the \$62,266.19 estimated to be due.

- C. The Debtor's proposed Chapter 13 Plan does not appear feasible at the higher estimated pre-petition arrears of \$62,266.19. The Debtor's Schedules I and J are not correct in that Schedule J lists an estimated mortgage payment on Schedule J as an expense when the mortgage is being paid by the Trustee as a conduit. Debtor relies on Social Security Income for herself and her daughter, and indicates an extremely tight budget with only \$250.00 allotted for food for two people per month. Because the Plan payment will need to increase by approximately \$500.00 a month to accommodate the higher ongoing mortgage payment and the higher pre-petition arrears, the Plan does not appear feasible.
- D. Debtor previously listed contribution income from an adult daughter in the amount of \$750.00 per month that is not included in the current Schedule I.

## **DISCUSSION**

Creditor's objections are well-taken.

### **Failure to Cure Arrearage of Creditor**

Creditor states the Plan seeks to cure "Wells Fargo Hm Mortgage." U.S. Bank National Association, c/o Wells Fargo Bank, N.A. ("Creditor"), holds a deed of trust secured by Debtor's residence. The Plan, therefore, has a typographical error when stating Wells Fargo Hm Mortgage has a claim.

Debtor's Plan states the arrears to Class 1 Creditor is in the amount of \$53,571.70, with an arrearage dividend of \$923.65 and a post-petition monthly payment of \$1,638.00. Dckt. 3 at 3. Creditor has filed a timely proof of claim in which it asserts \$61,585.29 in pre-petition arrearages. See Claim 2-1. Therefore, the Plan falls short of curing all of the arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

### **Failure to Afford Plan Payment**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Debtor's Schedules I and J are not correct in that Schedule J lists an estimated mortgage payment on Schedule J as an expense when the mortgage is being paid by the Trustee as a conduit. Debtor relies on Social Security Income for herself and her daughter, and indicates an extremely tight budget with only \$250.00 allotted for food for two people per month. Because the Plan payment will need to increase by approximately \$500.00 a month to accommodate the higher ongoing mortgage payment and the higher pre-petition arrears, the Plan does not appear feasible. Additionally, Debtor previously listed contribution income from an adult daughter in the amount of \$750.00 per month that is not included in the current Schedule I. Therefore, it appears Debtor has a significant decrease in ability to fund the plan. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by U.S. Bank National Association (“Creditor”) holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

16. <a href="#">21-23261</a> -E-13 <a href="#">PGM-2</a>	<b>FLORA BROUGHTON</b> <b>Peter Macaluso</b>	<b>CONTINUED MOTION TO CONFIRM PLAN 2-3-22 <a href="#">[52]</a></b>
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 3, 2022. By the court’s calculation, 40 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

<b>The Motion to Confirm the Amended Plan is <span style="color: red;">XXXXXXX</span>.</b>
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The debtor, Flora Elaine Broughton (“Debtor”), seeks confirmation of the Amended Plan. The Amended Plan provides for Plan payments of \$8,220.00 per month will commence March 25, 2022 for 55 months. Balance on hand as of February 2, 2022 is \$6,252.36, Trustee is to disburse an on-going mortgage payments to Class 1 creditor PHH for February 2022. Class 1 Mortgage lender, PHH was paid directly post-petition, for October, November, December and January 2022. Class 2 Creditor, Franklin/Bosco - line of creditor mature June 2021, 180 months from May 2006. Amended Plan, Dckt. 56. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

## **CHAPTER 13 TRUSTEE’S NON-OPPOSITION**

On February 22, 2022, David Cusick, Chapter 13 Trustee, filed a Non-Opposition to Debtor’s Motion to Confirm Amended Plan. Dckt. 63.

## **CREDITOR’S OPPOSITION**

Bosco Credit LLC (“Creditor”) holding a secured claim filed an Opposition on February 25, 2022. Dckt. 66. Creditor opposes confirmation of the Plan on the basis that:

- A. Creditor holds a lien on the Debtor’s principal residence. Debtor cannot modify Creditor’s lien pursuant to § 1322(b)(2). Further, Debtor is attempting to utilize the exception of § 1322(c)(2) by classifying the claim as a matured loan. Debtor states the loan is set to mature in June 2021, however, this is incorrect as the loan is set to mature in June 20, 2031. Additionally, Debtor proposes a 3.00% interest rate rather than the 12.750% currently existing.
- B. The proposed Plan does not set forth a reasonable schedule and time period for the payment of the arrearages owed to Secured Creditor.
- C. While Debtor’s amended Schedule I reflects a monthly income of \$10,721.71, half of that is from family contribution. Feasibility concerns aside, Debtor must provide for both repayment for the arrearages together with the correct ongoing monthly payment amount as follows:  
 $\$184,721.16 \text{ divided by } 60 \text{ months} = \$3,078.68$  plus the current monthly payment of \$2,321.69 for total monthly amount of \$5,400.37.

For these Opposition grounds, no evidence is provided to the court, but just the argument of counsel that such facts exist.

## **Debtor’s Reply**

On March 7, 2022, Debtor filed a reply stating:

- 1. Creditor is properly classified as class 2 because of the “publication” on October 7, 2021 and charges of \$1,514.00. Dckt. 68. The Notice of Sale being published calls for the acceleration of the terms which result in the allowance of a class 2 claim despite the regular note expiration on June 30, 2031.

2. Debtor is requesting a loan modification and does not oppose this Motion be continued to allow the processing of a loan modification.

Dckt. 68.

## DISCUSSION

### Modification of an Obligation Secured Only by Principal Residence

Creditor argues that Debtor's Plan was not filed in good faith and is an improper modification of a claim secured only by a security interest in real property that is Debtor's principal residence. Creditor has filed a Proof of Claim stating a secured claim in the amount of \$255,340.79, secured by a second priority deed of trust against the property commonly known as 5505 Jilson Way, Elk Grove, CA 95757. Debtor's Schedules indicate that this is Debtor's primary residence.

In the Reply to the Objection, Debtor states that "Based on the 'publication' . . . the Notice of Sale being published calls for the acceleration of the terms which results in the allowance of a class 2 claim. . . ." The court adding to this short reply and first cites to the anti-modification provision of 11 U.S.C. § 1322(b)(2) which states that a plan may:

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; . . .

Then in 11 U.S.C. § 1322(c)(2) [emphasis added] what had been given the creditor of a claim secured by a principal residence in 11 U.S.C. § 1322(b)(2) is whittled back by Congress, which provision states:

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and

(2) in a case in which the **last payment on the original payment schedule for a claim** secured only by a security interest in real property that is the **debtor's principal residence** is **due before the date on which the final payment under the plan is due**, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title. . . .

Congress provides in 11 U.S.C. § 1325(a)(5)(B)(ii) that the Plan may provide for treatment of the secured claim by payment of "[t]he value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; . . ."

Here, the Plan clearly provides for the payment of Creditor's secured claim, in full, over the 60 months of the Plan. In the Reply, Debtor makes reference to a Notice of Sale being published on October 7, 2021. Reply ¶ 1; Dckt. 68. Reference is made to a charge for that by Creditor. In the October 21, 2021 filed Notice of Postpetition Mortgage Fees, Expenses, and Charges for Proof of Claim 4-1 filed by Creditor, it states a "Publication" cost incurred on October 7, 2021 in the amount of \$1,514.00.

This October 7, 2021 "Publication" occurred post-petition. Since this was post-petition, it had to be to continue some pre-petition set date and not to take action against the Debtor or property of the Bankruptcy Estate in this case. 11 U.S.C. § 362(a). On the Attachment to Creditor's Proof of Claim 4-1, there is a \$225.00 posting cost and \$98.00 recording cost incurred August 12, 2021. POC 4-1, p. 11. If this is for recording a Notice of Default under California law, then the ninety (90) days of the Notice would expire on or about November 12, 2021.

California law provides in California Civil Code § 2924(e) that the default in an obligation secured by a deed of trust may be cured at "[a]ny time within the period commencing with the date of recordation of the notice of default until five business days prior to the date of sale set forth in the initial recorded notice of sale." Thus, the assertion is that since the Notice of Default was given by Creditor, then a foreclosure sale date set and no cure having been made prior to five days before the initial notice of sale date, then Creditor's claim is an obligation that was due in full on filing and is one that is due in full prior to the expiration of the sixty (60) month Plan term.

At the hearing, Creditor pointed the court to the provisions of 11 U.S.C. § 1322(c), arguing that (consistent with a Bankruptcy Appellate Panel decision) the reference to the original terms of the obligation controlled over the acceleration of the note making the obligation due in full when the case was filed.

## **Interest Rate**

Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 3.00%. Creditor's claim is secured by a second priority deed of trust on the subject property commonly known as 5505 Jilson Way, Elk Grove, CA 95757.

Creditor does not state would be the correct interest rate under applicable law. Rather, Creditor demands that it be paid a 12.75% interest rate. Also, nothing in the pleadings indicate how and why such a high interest rate (at least in the 21<sup>st</sup> Century) is reasonable.

The Supreme Court has provided guidance (as in controlling law) concerning the computation of adequate interest rates under bankruptcy plan in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The current "prime rate" is 3.25%. <sup>Fn.1.</sup> On Schedule A/B Debtor lists the Jilson Way property as having a value of \$960,000, after subtracting 8% for costs of sale. Adding that back in (the value is not a net, but actual value of the property, not sales proceeds) the value of the property appears

to be approximately \$1,040,000.

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FN. 1. <https://www.bankrate.com/rates/interest-rates/prime-rate/>,  
<https://www.wsj.com/market-data/bonds/moneyrates>

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Amended Proof of Claim 6-2 filed by Deutsche Bank National Trust Company, as Trustee, asserts a senior secured claim in the amount of (\$541,426.36). Creditor then asserts in Proof of Claim 4-1 having a secured claim of (\$255,340.79). This leaves an equity cushion of approximately \$243,234. While Creditor is stuck in a second lien position, Creditors has a six figure equity cushion. It appears that there is little risk of Creditor not being paid, either during this Plan or from a foreclosure sale on the Property.

Starting the 3.25% prime rate, in light of the (\$541,426.36) claim by the senior lien and also considering the substantial monthly payment required under the Plan (see computation below), the court makes a 0.5% upward adjustment in the interest rate to 3.75%, as being necessary for confirmation of the proposed Plan.

### **Failure to Cure Arrearage of Creditor**

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts \$184,721.16 in pre-petition arrearages.

However, under the plain reading of 11 U.S.C. § 1322(b)(5) and (c), and § 1325(a), there does not need to be a "cure" of arrearages, but payment of Creditor's claim in full.

Additionally, if there was a pre-petition cure amount to be provided for in the Plan, it would be based on the amount stated in the Proof of Claim, not the Plan, and the question being what is the correctly computed amount and whether payment of such is feasible. See First Amd Plan, ¶ 3.02; Dckt. 56.

### **Computation of Payment of Creditor's Claim Over Sixty (60) Month Term of Plan**

Using Creditor's Proof of Claim, the claim to be paid as of the commencement of this case is \$255,340.79. POC 4-1. This is the same as stated in the Opposition to Confirmation. Opp, p. 1:28 - 2:2; Dckt. 66.

Amortizing \$255,340.79 over sixty (60) months with an interest rate of 3.75% requires Creditor to be paid (\$4,673.74) a month. (Computed using the Microsoft Excel Mortgage Calculator program.)

The First Amended Plan for total payments of \$17,292.13 having been made through February 2022, and that the monthly Plan payment will be \$8,220.00 for the remaining fifty-five (55) months of the Plan. As drafted, other than for Creditor, the Plan requires the following payments (rounded up to the higher full cent):

1.	Debtor Counsel (\$2,500/60 months).....	(\$ 42)
2.	Chapter 13 Trustee Fees.....	(\$ 822)
3.	Class 2 Car Payment.....	(\$ 215)
4.	Class 1 Current Mortgage and Cure.....	(\$2,496)
5.	Priority (\$6,535.94/60).....	(\$ 109)
		=====
Total Payments Other than Creditor.....		(\$3,684)

Creditor's monthly payment amount is (\$4,674), creating a total amount (when amortized over sixty (60) months) necessary plan payment of \$8,358.

Doing a "backdoor calculation," Debtor has funded the Plan with a payment of \$17,292.13 for the first five months of the Plan, and then over the next fifty-five months will fund it with an additional \$452,100, for total Plan funding of \$469,392.13.

With monthly plan payments of \$8,358 required, when multiplied by sixty months, then the total Plan funding needs to be \$501,480. Thus, it appears that Debtor is around \$50,000 short in the Plan funding.

At the hearing, the Parties expressed a desire to make a final effort at reaching a loan modification resolution before engaging in further pleadings addressing the proper interpretation of 11 U.S.C. § 1322. The court continues the hearing.

#### **April 19, 2022 Hearing**

No additional documents or pleadings have been filed in anticipation of this hearing. At the hearing, **XXXXXXX**.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, Flora Elaine Broughton ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that hearing on the Motion to Confirm the Amended Plan is continued to 2:00 p.m. on **XXXXXXX**, 2022, for a status conference relating to whether there is an agreement for a loan modification or other agreement to allow for modification of the Plan, or if a supplemental briefing schedule will be necessary.



**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

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Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on March 30, 2022. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing -----  
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<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
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The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that:

- A. Debtor is unable to make Plan payments, the Plan does not comply with 11 U.S.C. § 1322, the Plan is underfunded, and the Plan exceeds the maximum term of sixty (60) months.
- B. The Plan does not provide for the cure of mortgage arrearages.
- C. Debtor failed to provide business documents.
- D. Debtor may not be able pay quarterly taxes if funds are not segregated to a tax account.

- E. Improper/overuse of C.C.P. § 704.070.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Failure to Afford Plan Payment / Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6).

The Plan is underfunded. Class 2 of the Plan reflects Internal Revenue Service and Franchise Tax Board claims of \$1.00 and Class 5 estimates priority debts at \$18,208.00. The Internal Revenue Service filed a Proof of Claim showing \$8,977.37 as secured and \$48,499.84 as priority. The Franchise Tax Board also filed a Proof of Claim showing \$987.22 as priority and \$633.26 as unsecured.

Debtors expensed \$2,000.00 per month as "Other Taxes" in their Schedules and Statements. However, the Internal Revenue Service filed a Proof of Claim in the amount of \$33,460.00. Claim No. 10. Trustee is concerned Debtor may not have enough funds to pay quarterly taxes without the establishment of a tax account.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

### **Plan Term is Greater Than 60 months**

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to Trustee, the Plan will complete in 78 months due to miscalculated Plan payment. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

### **Failure to Cure Arrearage of Creditor**

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts \$3,255.07 in pre-petition arrearages. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

### **Failure to File Documents Related to Business**

Debtor has failed to timely provide Trustee with business documents including:

- A. Questionnaire,
- B. Two years of tax returns,
- C. Six months of profit and loss statements,
- D. Six months of bank account statements, and
- E. Proof of license and insurance or written statement that no such

documentation exists.

11 U.S.C. §§ 521(e)(2)(A)(I), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

### **Improper use of C.C.P. § 704.070**

Debtor has claimed exemptions for the full amounts in several bank accounts using exemptions C.C.P. §§ 704.070(a)(1) and (b)(2). C.C.P. § 704.070(a)(1) relates to earnings paid to an employee and C.C.P. § 704.070(b)(2) allows for exemption of only 75% of paid earnings. The Trustee's objection to these exemptions is forthcoming and the Trustee's concerns are well-taken.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on March 4, 2022. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

<p><b>The Motion to Confirm the Modified Plan is denied.</b></p>
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11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Dolores Marie Haughton ("Debtor"), has filed evidence in support of confirmation. Debtor seeks to modify the plan due to a decline in income and a rise in housing costs. Motion, Dckt. 17. The Modified Plan provides \$560.00 for 10 months, \$783.00 for 19 months, and then \$552.00 for 31 months. Modified Plan, Dckt. 19. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### **CHAPTER 13 TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 5, 2022. Dckt. 23. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent \$427.17 in plan payments.

## DISCUSSION

### Delinquency

The Chapter 13 Trustee asserts that Debtor is \$427.17 delinquent in plan payments, which represents less than one month of the \$552.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Dolores Marie Haughton (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on March 8, 2022. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

<b>The Motion to Confirm the Modified Plan is denied.</b>
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The debtor, Laura Hope Hilton ("Debtor") seeks confirmation of the Modified Plan because of hardship faced during the Covid-19 pandemic. Declaration, Dckt. 65. The Modified Plan provides for monthly payments of \$266.00 beginning March 25, 2022 with an extension of the Plan period to 74 months, and a 0% percent dividend to unsecured claims totaling \$36,815.64. Modified Plan, Dckt. 63. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 4, 2022. Dckt. 70. Trustee opposes confirmation of the Plan on the basis that:

- A. Failure to show cause for extension under the CARES Act.
- B. Particulars of reason for modification are unclear.

## DISCUSSION

### CARES Act Expiration

Trustee represents that Debtor failed to provide sufficient detail as to how she suffered a material financial hardship due to the Covid-19 pandemic. Trustee further notes that the Act has expired; however, they are of the belief the court can confirm a plan under the Act where cause exists.

Pursuant to the CARES Act, under 11 U.S.C. § 1329(d), modification of a plan that was confirmed before March 27, 2021 may be extended up to seven (7) years so long as the debtor is or has “experienced a material financial hardship” due to COVID-19. 11 U.S.C. § 1329(d), however, has a sunset provision that effectively reverted 11 U.S.C. § 1329(d) to pre-CARES Act provisions on March 27, 2022. *See* H.R.1651 - 117th Congress (2021-2022): COVID-19 Bankruptcy Relief Extension Act of 2021, H.R.1651, 117th Cong. (2021).

A sunset law or sunset provision is defined as a “statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed.” *Black’s Law Dictionary* 1574 (9<sup>th</sup> ed. 2009). The Ninth Circuit has interpreted sunset provisions to render statutes ineffective after the explicit date provided by the sunset provision. *See Bates v. Sullivan*, 894 F.2d 1059, 1071 (9<sup>th</sup> Cir. 1990) (explaining that the statute at issue includes a sunset clause which renders the statute ineffective for cases where determinations are made after the date provided by the clause).

Congress may allow such statutes to expire on the express date given by the sunset provision, opt to extend the expiration date (as in the case of Congress extending the CARES Act amendments to 11 U.S.C. § 1329 for an additional year), or amend/reenact such statutes without the sunset provision. *See e.g., Richlin Sec. Serv. Co. V. Chertoff*, 553 U.S. 571, 583 n.7 (2008) (describing how the first enacted version of an act had a sunset provision rendering it ineffective after four years, and that Congress reenacted the act without the sunset provision a year later); *Fireman’s Fund Ins. Co v. City of Lodi*, 302 F.3d 928, 934 n.2 (9<sup>th</sup> Cir. 2002) (describing how an act “became inoperative” on January 1, 1999 pursuant to a sunset clause and was later reenacted on May 26, 1999 without a sunset clause). Congress has not extended the CARES Act beyond March 27, 2022. Therefore, due to the sunset provision, 11 U.S.C. § 1329(d) is no longer effective and the maximum length of a modified plan is five (5) years, pursuant to 11 U.S.C. § 1329(c).

The plan is therefore overextended and does not comply with the provisions of 11 U.S.C. § 1329(c) and cannot be confirmed.

### Reason for Modification

Trustee represents that the details surrounding the need for modification are unclear. Debtor noted that they became delinquent on Plan payments due to an increase and HOA dues because of a special assessment; however, Debtor does not explain the details of the assessment and whether the co-owner of the property will contribute to the cost. Without an accurate picture of Debtor’s financial reality, the court cannot determine whether the Plan is confirmable.

The Modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Laura Hope Hilton (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

20. [20-20076-E-13](#)      **SHARON/JOHN FARVE**      **MOTION TO MODIFY PLAN**  
[PGM-2](#)      **Peter Macaluso**      **3-3-22 [59]**

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 3, 2022. By the court’s calculation, 47 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

<b>The Motion to Confirm the Modified Plan is granted.</b>
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The debtor, Sharon Fay Farve and John Delford Farve (“Debtor”) seeks confirmation of the Modified Plan because of a car accident and taxes being higher than expected. Declaration, Dckt. 61.



The Modified Plan provides for Plan payments in the amount of \$370.00 starting on March 25, 2022 and continuing through the life of the Plan, and a 0 percent dividend to unsecured claims totaling \$0.00. Modified Plan, Dckt. 63. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on March 18, 2022. Dckt. 65. Trustee opposes confirmation of the Plan on the basis that:

- A. Inability to make Plan payments due to uncertainty of Debtor's car payments as they were financing a car through CarMax that was totalled. Trustee is now unsure about Debtor's monthly car payments and any insurance proceeds received.

## SUPPLEMENTAL DECLARATION

Debtor filed a supplemental declaration stating the car they had was totalled and they were released from their obligation with Carmax. Currently they are using their mothers car. They have \$450.00 budgeted for gas and their social security is saved to cover issues such as rising gas prices.

Debtor's explanation appears to resolve Trustee's concerns.

At the hearing, ~~XXXXXXXXXX~~

~~\_\_\_\_\_The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.~~

~~The court shall issue an order substantially in the following form holding that:~~

~~\_\_\_\_\_Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~\_\_\_\_\_The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Sharon Fay Farve and John Delford Farve ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~\_\_\_\_\_IT IS ORDERED that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on March 3, 2022, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.~~

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

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Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on March 30, 2022. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing -----  
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<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
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The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that:

- A. The Debtor cannot make Plan payments and the Plan does not comply with applicable law because of the following issues with creditor treatment:
  - 1. Golden 1 Credit Union: It will take 72 months to pay the claim in full.
  - 2. Bank of America: It will take 70 months to pay the claim in full.
  - 3. Mortgage to JPMCB: The mortgage amount listed in the Debtor's Schedules and Statements varies from that disclosed in the Debtor's Plan.

4. There is an excess priority claim based on a Proof of Claim filed by the Internal Revenue Service with reflects a priority amount of \$37,805.22. It will take 82 months to pay the claim in full.
- B. The Debtor's failed to disclose business income making it unclear if they would pass the liquidation analysis.
- C. Debtor filed a duplicate Plan at the request of the Trustee. As the Plan is a duplicate of the original filing a Motion to Confirm Plan is not required and the Trustee does not object to the plan on this basis.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Failure to Afford Plan Payment / Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). There are several issues with creditor treatment that result in the plan extending beyond the 60 month maximum period. Additionally, there is a discrepancy in the amount of the mortgage payment that hinders the Trustee's ability to assess feasibility. Finally, there is an excess priority claim not accounted for in the Plan. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

### **Failure to Provide for a Priority Claim**

Trustee asserts that the Internal Revenue Service has a claim for \$37,805.22 in priority debt. Proof of Claim 3, filed on March 7, 2022. The Plan does not provide for all priority debt as required by 11 U.S.C. § 1322(a)(2).

### **Debtor May Fail Liquidation Analysis**

Debtor's Plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Trustee states that Debtor failed to disclose business income. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Debtor passes the Liquidation Analysis.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

# FINAL RULINGS

22. [19-24611](#)-E-13      RONALD/KIMBERLY GARNER      MOTION TO MODIFY PLAN  
[DBJ-1](#)      Douglas Jacobs      3-11-22 [38]

**Final Ruling:** No appearance at the April 19, 2022 hearing is required.  
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**The Motion to Modify Confirmed Chapter 13 Plan is dismissed without prejudice.**

Ronald W. Garner and Kimberly K. Garner (“Debtor”) having filed a “Notice of Withdrawal of Motion”, which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on April 8, 2022, Dckt. 48; no prejudice to the responding party appearing by the dismissal of the Motion; Debtor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by Chapter 13 Trustee David P. Cusick (“the Chapter 13 Trustee”); the Ex Parte Motion is granted, Debtor’s Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Modify Confirmed Chapter 13 Plan filed by Ronald W. Garner and Kimberly K. Garner (“the Debtor”) having been presented to the court, Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 48, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Modify Confirmed Chapter 13 Plan is dismissed without prejudice.

**Final Ruling:** No appearance at the April 19, 2022 hearing is required.

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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 28, 2022. By the court’s calculation, 82 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

<p><b>The Motion to Confirm the Modified Plan is granted.</b></p>
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11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Kyle Andrew Farris and Graciela Jaramillo-Farris (“Debtor”), has filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick (“Trustee”), filed a Response indicating non-opposition on February 14, 2022. Dckt. 55. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

## **TRUSTEE’S RESPONSE**

### **Plan Payments Due Before Hearing**

Trustee notes that there are two Plan payments due prior to the hearing on the Motion, one on February 25, 2022, and the other on March 25, 2022. Both payments are each in the amount of \$4,770.00. Trustee represents that they will file a motion to dismiss if either payment is not made.

### **Increase in Payments by \$400.00 in Approximately Two Years**

Trustee notes that the Plan payment will increase by approximately \$400.00 from \$4,770.00 to \$5,170.00 in twenty-five (25) months. Trustee believes the increase in payment amount is reasonable based on news coverage of salary increases for correctional officers. Trustee believes Debtor can make the proposed payment.

### **Basis for Prior Default**

Debtor represents that the reasons for the prior default are fluctuating income and expenses and spending too much. Trustee finds these reasons acceptable and is not opposed to spending too much as one of the reasons for modification this time, provided Debtor learns from the experience and avoids a similar situation in the future. Trustee believes the modification is proposed in good faith pursuant to 11 U.S.C. § 1325(a)(3).

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Kyle Andrew Farris and Graciela Jaramillo-Farris (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and Debtor’s Modified Chapter 13 Plan filed on January 28, 2022, is confirmed. Debtor’s Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick (“Trustee”), for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.

**DEBTOR DISMISSED: 3/10/2022**

**Final Ruling:** No appearance at the April 19, 2022 hearing is required.  
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The case having previously been dismissed, the Motion is dismissed as moot.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm Amended Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.



**Final Ruling:** No appearance at the April 19, 2022 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor’s Attorney on March 9, 2022. By the court’s calculation, 41 days’ notice was provided. 28 days’ notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

<b>The Objection to Discharge is sustained.</b>
---

David P. Cusick, the Chapter 13 Trustee (“Objector”) objects to Kenneth Scott Loke’s (“Debtor”) discharge in this case. Objector argues that Debtor is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on October 28, 2019. Case No. 19-26680. Debtor received a discharge on September 21, 2021. Case No. 19-26680, Dckt. 61.

The instant case was filed under Chapter 13 on February 1, 2022.

11 U.S.C. § 1328(f) provides that a court shall not grant a discharge if a debtor has received a discharge “in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter.” 11 U.S.C. § 1328(f)(1).

Here, Debtor received a discharge under 11 U.S.C. § 727 on September 21, 2021, which is less than four years preceding the date of the filing of the instant case. Case No. 19-26680, Dckt. 61. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No. 22-20235), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to Discharge filed by David P. Cusick, the Chapter 13 Trustee (“Objector”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 22-20235, the case shall be closed without the entry of a discharge.

**WITHDRAWN BY M.P.**

**Final Ruling:** No appearance at the April 19, 2022 hearing is required.  
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<p><b>The Objection is dismissed without prejudice.</b></p>
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David P. Cusick (“the Chapter 13 Trustee”) having filed a “Withdrawal of Motion”, which the court construes to be an Ex Parte Motion to Dismiss the pending Objection on March 28, 2022, Dckt. 95; no prejudice to the responding party appearing by the dismissal of the Objection; the Chapter 13 Trustee having the right to request dismissal of the objection pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by Carlos Palacios-Cazares (“ Debtor”); the Ex Parte Motion is granted, the Chapter 13 Trustee’s Objection is dismissed without prejudice, and the court removes this Objection from the calendar.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection filed by David P. Cusick (“the Chapter 13 Trustee”) having been presented to the court, the Chapter 13 Trustee having requested that the Objection itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 95, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection is dismissed without prejudice.

**Final Ruling:** No appearance at the April 19, 2022 hearing is required.

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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on March 9, 2022. By the court’s calculation, 41 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

<p><b>The Motion to Confirm the Amended Plan is granted.</b></p>
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11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The debtor, Benjamin Adam Reuter (“Debtor”) has provided evidence in support of confirmation. The Chapter 13 Trustee, David Cusick (“Trustee”), filed a Non-Opposition on March 15, 2022. Dckt. 28. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, Benjamin Adam Reuter (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and Debtor’s Amended

Chapter 13 Plan filed on March 9, 2022, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.